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IN THE

Supreme Court of the United States

October Term, 1966

No.

CONTINENTAL CASUALTY COMPANY,

Petitioner,

v.

FLOAT-AWAY DOOR COMPANY and NATIONAL SURETY CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Continental Casualty Company, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this case on December 1, 1966 (Rehearing denied March 3, 1967), which reversed a Summary Judgment in petitioner's favor entered by the United States District Court for the Northern District of Georgia.

OPINIONS BELOW

The opinion of the Court of Appeals, which is reported at 372 F.2d 701, is reprinted in Appendix A

hereto, *infra*, p. 1a. The opinion of the Court of Appeals denying the petition for rehearing, which is also reported at 372 F.2d 701, is reprinted in Appendix B hereto, *infra*, p. 19a. The opinion of the District Court (R. 90-94), which is not reported, is reprinted in Appendix C hereto, *infra*, p. 23a.

JURISDICTION

The judgment of the Court of Appeals, which is reprinted in Appendix D hereto, *infra*, p. 27a, was entered on December 1, 1966. (R. 128.) Petitioner's timely petition for rehearing was denied by the Court of Appeals on March 3, 1967. (R. 185; Appendix B, *infra*, p. 19a.) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Must a Federal Court (Court of Appeals as well as District Court), in a diversity of citizenship case subject to *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), conform its decisions to the relevant dictum of an intermediate state court of appeals not contradicted by or inconsistent with any other decision by any court of that state, or may such Federal Court refuse to follow such dictum because it believes another line of decisions from other jurisdictions to be better reasoned?

2. Where, in a diversity of citizenship case subject to the rule in *Erie*, after a petition for rehearing in the Federal Court of Appeals has been denied, but before the time for a petition for a writ of certiorari to this Court has expired, a decision is rendered by a state appellate court precisely controlling on the issue which was before the Federal Court of Appeals and directly

contrary to the ruling of the Federal Court of Appeals, will this Court require the Federal Court decision to conform to the state court decision either by the grant of a petition for a writ of certiorari or by an immediate remand of the proceedings to the Federal Court of Appeals for reconsideration in light of the intervening decision by the state appellate court?

STATUTES INVOLVED

The "Rules of Decision Act," 62 Stat. 944, 28 U.S.C. §1652, is relevant to the questions presented by this petition. That Act provides:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

STATEMENT OF THE CASE

In 1961 Mr. Lawrence E. Barrett ("Barrett"), an employee of Universal Manufacturing Company ("Universal"), sustained personal injuries while unloading for his employer a Dance Freight Lines, Inc. ("Dance") trailer which had been loaded by Float-Away Door Company ("Float-Away"). (R. 61-64.) Subsequently, in 1963, Barrett filed in the United States District Court for the Northern District of Georgia a personal injury lawsuit against Dance and Float-Away, seeking damages in the amount of $770,000.00. (R. 59-71.)

National Surety Corporation ("National Surety") insured Float-Away under a comprehensive general and automobile liability policy with $100,000.00 limits, and Continental Casualty Company ("Continental") in-

sured Dance under a comprehensive automobile liability policy with $1,000,000.00 limits.[1] (R. 2-5.) After the filing of the Barrett personal injury lawsuit, National Surety and its named-insured, Float-Away, asserted that Float-Away, by virtue of its "use" (loading) of the Dance trailer, was an "omnibus" or "additional" insured under the Continental-Dance policy, and demanded that Continental take over the defense of Float-Away and pay any judgment rendered against Float-Away. Continental refused the demands made by National Surety and its named-insured, Float-Away, denying that Float-Away was entitled to coverage under the Continental-Dance policy. (R. 7-8.)

Thereafter, and during the pendency of the Barrett personal injury lawsuit, National Surety and Float-Away filed in the United States District Court for the Northern District of Georgia a declaratory judgment action against Continental, seeking a declaration that Float-Away was insured under the Continental-Dance policy, that the Continental-Dance policy provided "primary" coverage for Float-Away, that the National Surety—Float-Away policy provided only "excess" coverage for Float-Away, that Continental was obligated to assume the defense of Float-Away in the Barrett personal injury lawsuit, and that the coverage extended to Float-Away as a named-insured under the National Surety—Float-Away policy was to be resorted to only after the coverage afforded Float-Away under the Continental-Dance policy had been fully exhausted. (R. 8-9, 74-76.) National Surety and Float-Away invoked the jurisdiction of the District Court on the basis of diversity of citizen-

[1]Continental is the petitioner herein; National Surety and its named-insured, Float-Away, are the respondents.

ship and an amount in controversy in excess of $10,000.00. (R. 1.)

The respondents herein, National Surety and its named-insured, Float-Away, filed a motion for summary judgment in the District Court, and Continental, the petitioner herein, filed a cross-motion for summary judgment. (R. 79-82, 85-87.) On May 11, 1965, the District Court denied respondents' motion, granted petitioner's motion, and ruled that Float-Away was not entitled to coverage under the Continental-Dance policy. (R. 90-94; Appendix C, *infra,* p. 23a.)

On appeal, the Court of Appeals for the Fifth Circuit reversed the District Court's ruling, and held that Float-Away was an omnibus-insured under the Continental-Dance policy, that the employee-workmen's compensation exclusions in that policy (R. 11) did not apply to exclude Float-Away from coverage, and that Continental was primarily liable for Float-Away's portion of the Barrett judgments.[2] 372 F.2d 701; Appendix A, *infra,* p. 1a.

In this petition for a writ of certiorari Continental seeks review only of that portion of the decision of the Court of Appeals which held that the employee-workmen's compensation exclusions in the Continental-Dance policy do not apply to exclude Float-Away from coverage under the Continental-Dance policy.

---

[2]During the interval between the District Court's ruling and the opinion of reversal of the Court of Appeals for the Fifth Circuit, the Barrett personal injury lawsuit was settled, and consent judgments against Float-Away and Dance, and in favor of Barrett and his father, were entered in the total amount of $175,000.00. Float-Away's liability is for one-half of that amount, or $87,500.00.

The Continental-Dance policy, under which Float-Away seeks coverage, provides in part (R. 23):

> "Definition of Insured . . . With respect to the insurance for Bodily Injury Liability . . . the unqualified word 'insured' includes the named insured and also includes any person while using an owned automobile . . . providing the actual use of the automobile is by the named insured or with his permission. . . ."

Regarding employee-workmen's compensation exclusions, the Continental-Dance policy provides (R. 11):

> "This policy does not apply:
>
> * * * *
>
> "(b) . . . to bodily injury to or sickness, disease or death of any employee of the insured arising out of and in the course of (1) domestic employment by the insured, if benefits therefor are in whole or in part either payable or required to be provided under any workmen's compensation law, or (2) other employment by the insured;
>
> "(c) . . . to any obligation for which the insured or any carrier as his insurer may be held liable under any workmen's compensation, unemployment compensation or disability benefits law, or under any similar law. . . ."

It is undisputed that the injured person, Mr. Barrett, was injured while unloading the Dance trailer in the course of his employment by Universal, and that, as required by the Workmen's Compensation Law of Ohio, Mr. Barrett was provided workmen's compensation benefits for his injuries. (R. 63-64, 86-87.) It is also un-

disputed that at the time Mr. Barrett's injuries occurred, Universal, through Mr. Barrett, its employee, was unloading the Dance trailer (R. 63-64), — thus Universal, Mr. Barrett's employer, was an omnibus-insured under the Continental-Dance policy.[3]

As the injured person, Mr. Barrett, was an employee of Universal, and as Universal was an insured under the Continental-Dance policy, it is Continental's contention that the employee-workmen's compensation exclusions, — "This policy does not apply . . . to bodily injury to . . . any employee [Barrett] of the insured [Universal] arising out of and in the course of . . . employment by the insured [Universal] . . . [or] to any obligation for which the insured [Universal] may be held liable under any workmen's compensation . . . law . . ." (R. 11), — applied to exclude Float-Away from coverage.

In support of its contention that the employee-workmen's compensation exclusions applied to exclude Float-Away from coverage, Continental in its briefs and arguments to the Fifth Circuit relied principally upon the decision of the Georgia Court of Appeals in *Fireman's Fund Indem. Co. v. Mosaic Tile Co.*, 101 Ga. App. 701, 115 S.E.2d 263 (1960).[4] In that case the Georgia Court of Appeals had under consideration the same "Definition of Insured" ("any person while using" R. 23) and

[3]The Continental-Dance policy defines "use" as including unloading (R. 12), and defines an insured as "any person while using [unloading] an owned automobile." (R. 23.) Thus Universal, Barrett's employer, was an omnibus-insured under the Continental-Dance policy. In its opinion denying rehearing, the Fifth Circuit acknowledged that Universal was an omnibus-insured. 372 F.2d 710; Appendix B, *infra*, p. 22a.

[4]For convenient reference, that decision is incorporated herein as Appendix E, *infra*, p. 29a.

the same employee-workmen's compensation exclusions clause as are here under consideration. The *Mosaic Tile* case also involved a fact situation substantially identical with the one involved here, the only difference being that in *Mosaic Tile* the injured employee-plaintiff (Martin) was an employee of the named-insured (Gate City Tile Company), whereas in this case the injured employee-plaintiff (Barrett) was an employee of an omnibus-insured (Universal).

In response to an "exclusion argument" practically identical to the one presented below by Continental, the Georgia Court of Appeals in *Mosaic Tile* first held that the policy provisions under consideration were "clear and unambiguous." 101 Ga. App. 703, 115 S.E.2d 264, Appendix E, *infra,* p. 31a. The Georgia Court then held that, by policy definition, the word "insured" in the employee-workmen's compensation exclusions clause was "*broad* enough to include, *and clearly does include, both* the named insured and *all additional insured*[*s*]," (101 Ga. App. 704, 115 S.E.2d 265, Appendix E, *infra,* p. 33a) (italics added), and ruled that the exclusion clause excluded from coverage the omnibus-insured, Mosaic Tile Company.

In its opinion below, the Court of Appeals for the Fifth Circuit acknowledged that in this diversity case the applicable conflict of laws rules required that the Continental-Dance policy be construed in conformity with the " 'common law' as illumined by Georgia decisions." 372 F.2d 704; Appendix A, *infra,* p. 4a. The Court of Appeals for the Fifth Circuit concluded, however, that as *Mosaic Tile* involved an injured employee of a named-insured, rather than an injured employee of an omnibus-insured, it was not required to follow that

Georgia decision, and, accordingly, the Court of Appeals for the Fifth Circuit followed cases from jurisdictions other than Georgia, which "adopt a restrictive interpretation of 'the insured' [in the employee-workmen's compensation exclusions] as referring only to the party seeking coverage under the policy." 372 F.2d 708; Appendix A, *infra*, p. 16a.

In connection with its determination not to follow the *Mosaic Tile* case, the Court of Appeals for the Fifth Circuit, in its March 3, 1967, opinion denying rehearing, stated:

> "As to *Fireman's Fund Indemnity Co. v. Mosaic Tile Co.*, 101 Ga. App. 701, 115 S.E.2d 263, the Georgia Court of Appeals was confronted with a case that involved an injured employee of the named insured. *The opinion does not indicate that if the injured employee was employed by a third party, who is an omnibus insured different from the one involved in the action before the court, that a similar holding would result. While Georgia did not restrict the definition of 'insured' to the party seeking coverage, it also did not adopt the all-inclusive approach suggested by the appellee.*" 372 F.2d 710; Appendix B, *infra*, p. 21a. (Italics added.)

On May 2, 1967, sixty days after the above-quoted statement by the Court of Appeals for the Fifth Circuit, the Georgia Court of Appeals, in *Nationwide Mutual Insurance Co. v. Peek*, Appeal No. 42700, ____ Ga. App. ____, ____ S.E.2d ____ (May 2, 1967), expressly refused to construe the meaning of the word "insured" in an exclusion clause similar to the one involved here as referring only to the "party seeking cov-

erage," and expressly and unequivocally adopted what the Fifth Circuit in the above-quoted statement had described as "the all-inclusive approach suggested by the appellee [Continental]."

The sharp conflict thus created between the decision in this case of the Court of Appeals for the Fifth Circuit and the now clearly established case law of Georgia constitutes the basis for this petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

1.

The first reason why this Honorable Court should grant Continental's petition for a writ of certiorari is that the decision by the Fifth Circuit in this case is in direct, head-on conflict with the decisions of the appellate courts of the State of Georgia. The seriousness of that conflict is underscored by the fact that in its opinion the Court of Appeals for the Fifth Circuit acknowledged that in this diversity of citizenship case the applicable conflict of laws rules require that the decision upon the substantive questions involved must conform to the "common law as illumined by Georgia decisions." 372 F.2d 703-4; Appendix A, *infra*, p. 4a.

The decision of the Court of Appeals for the Fifth Circuit in this case conflicts with the decisions of the Georgia appellate courts in two ways:

(1) Sixty days after the Court of Appeals for the Fifth Circuit denied rehearing the Georgia Court of Appeals rendered a decision squarely contrary to that of the Court of Appeals for the Fifth Circuit; and

(2) Apparently because it considered the rele-

vant language in the case to be dictum, the Fifth Circuit refused to follow the decision of the Georgia Court of Appeals in *Fireman's Fund Indemnity Co. v. Mosaic Tile Co.*, 101 Ga. App. 701, 115 S.E.2d 263 (1960), which case, at the time the Court of Appeals for the Fifth Circuit rendered its decision below, was the only Georgia case dealing with the question at issue.

As indicated above, the Court of Appeals for the Fifth Circuit construed the words "the insured" in the employee-workmen's compensation exclusions clause in the Continental-Dance policy as referring only to the particular "insured" seeking coverage under the policy (or to the named-insured). That holding is in direct conflict with the decision rendered by the Georgia Court of Appeals on May 2, 1967, in *Nationwide Mutual Insurance Company v. Peek*, copy of which is appended hereto as Appendix F, page 36a, *infra*.[5]

In the *Nationwide* case, Wilson and Peek each owned a truck, and each leased his truck to Watkins Motor Lines, Inc. ("Watkins"), which was insured by Nationwide Mutual Insurance Company ("Nationwide"). While under lease to Watkins, the two trucks were involved in a collision, Peek's truck was damaged, and Peek sued Wilson to recover for the damage. Under the Nationwide-Watkins policy, which contained the same "Definition of Insured" clause as the Continental-Dance policy involved here,[6] Wilson was an omnibus-insured,

[5]The *Nationwide* case was decided so recently that it has not yet been reported. Appendix F, *infra*, is a copy of the "slip opinion" furnished to petitioner by the Clerk of the Georgia Court of Appeals.

[6]Compare the "Definition of Insured" clause in the *Nationwide*

and he called upon Nationwide to defend him in the Peek damage suit. Nationwide refused, and brought a declaratory judgment suit against both Wilson, the party claiming coverage and the defendant in the Peek damage suit, and Peek, the plaintiff in the damage suit.

An exclusion clause in the Nationwide-Watkins policy provided:

> "This policy does not apply . . . (f) under Coverage E, to injury to or destruction of property owned or transported by the Insured, or property rented to or in charge of the Insured other than a residence or private garage injured or destroyed by a private passenger automobile covered by this policy." Appendix F, *infra*, p. 38a.

Nationwide contended that even though Wilson admittedly was an omnibus-insured, the above-quoted exclusion clause applied to exclude Wilson from coverage. In support of that contention Nationwide presented the following argument:

> (1) Peek, the plaintiff in the damage suit, was also an omnibus-insured [not the named insured] under the Nationwide-Watkins policy; and
>
> (2) As Peek, an omnibus-insured, owned the damaged truck, Wilson, the other omnibus-insured seeking coverage, was excluded from coverage by virtue of the "owned property" exclusion, even though Peek, — not Wilson, the omnibus-insured seeking coverage, — was the owner of the damaged truck.[7]

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case, Appendix F, *infra*, p. 37a, with the "Definition of Insured" clause in the Continental-Dance policy, R. 23.

[7]In the case at bar, Continental makes the same argument:

In response to Nationwide's arguments, Wilson and Peek argued, as did respondents herein below, that the "severability of interest" clause in the Nationwide-Watkins policy required the finding that the word "insured" in the exclusion clause referred only to the particular insured seeking coverage, and that, as Wilson was the insured seeking coverage, and Peek, rather than Wilson, was the owner of the damaged truck, the exclusion clause did not apply to exclude Wilson from coverage.[8]

Thus, in *Nationwide,* the Georgia Court of Appeals was confronted with an argument based upon the same premises as the decision of the Court of Appeals for the Fifth Circuit in this case, namely, that the words "the insured" in the exclusion clause, refer only to the particular insured seeking coverage (or to the named-insured). The Georgia Court of Appeals expressly rejected that argument (and impliedly, the ruling by the Court of Appeals for the Fifth Circuit in this case), and ruled that the exclusion clause operated to exclude Wilson from coverage, even though Wilson, the omnibus-insured seeking coverage, was not the owner of the dam-

---

(1) Barrett, the plaintiff in the personal injury lawsuit, was an employee of Universal; and

(2) As Universal was an omnibus-insured, Float-Away, the omnibus-insured seeking coverage, is excluded from coverage by virtue of the employee-workmen's compensation exclusions, even though Universal,—not Float-Away, the omnibus-insured seeking coverage,—was the employer of Barrett.

Just as Peek's truck was "property owned by . . . the insured," so Barrett was an "employee of the insured."

[8]The Continental-Dance policy of course contains a "severability of interest" clause identical to the one involved in the *Nationwide* case. Compare Appendix F, *infra,* p. 38a, with page 12 of the Record herein.

aged truck. In so ruling, the Georgia Court of Appeals flatly held: "The 'severability of interest' clause *does not modify the exclusion clause to mean only the person claiming coverage.*" Appendix F, *infra*, p. 39a. (Italics added.)

Thus it is clear that the ruling of the Court of Appeals for the Fifth Circuit concerning the applicability of the exclusion clause in this case is in direct and irreconcilable conflict with the recent holding by the Georgia Court of Appeals in *Nationwide Mutual Insurance Company v. Peek.*

The decision of the Court of Appeals for the Fifth Circuit also conflicts with the decisions of the Georgia appellate courts because, as indicated above, the Court of Appeals for the Fifth Circuit apparently considered the relevant language in *Fireman's Fund Indemnity Co. v. Mosaic Tile Co.*, 101 Ga. App. 701, 115 S.E.2d 263 (1960) (Appendix E, *infra*, p. 29a) to be dictum, and refused to follow or apply the Georgia Court of Appeals' statement in that case that the policy definition of the word "insured" in an employee-workmen's compensation exclusions clause identical to the one involved here was "broad enough to include, and clearly does include, both the named insured and *all* additional insured[s]." 101 Ga. App. 704, 115 S.E. 2d 265 (Appendix E, *infra*, p. 33a). (Italics added.)

If the Fifth Circuit had followed the Georgia Court of Appeals statement in *Mosaic Tile* that the employee-workmen's compensation exclusions applied to "the named insured and *all* additional insured[s]," clearly Float-Away would have been excluded from coverage, as the injured person, Barrett, was an employee of an omni-

bus-insured, Universal. It is submitted that the Court of Appeals for the Fifth Circuit was required to follow the relevant "dictum" of the Georgia Court of Appeals in *Mosaic Tile.*

Regarding matters which should be controlled by state law, the Court of Appeals for the Fifth Circuit itself has held that, in the absence of a direct holding by the appellate courts of the State in question, a Federal court in a diversity case should follow the dicta of the appellate courts of that State. *Delduca v. U.S. Fid. & Guar. Co.,* 357 F.2d 204, 206 (5th Cir. 1966); *Doucet v. Middleton,* 328 F.2d 97, 101-2 (5th Cir. 1964). Particularly should that be true where, as here, (1) the dictum of the state appellate court is not contradicted by or inconsistent with any other dictum or decision of that court, or any other court of that state, and (2) the Federal court has acknowledged that its decision must conform to the decisions of the appellate courts of the particular State in question.

Petitioner respectfully submits that the Court of Appeals for the Fifth Circuit should have followed the Georgia Court of Appeals "dictum" in *Mosaic Tile,* and that the refusal to do so of the Court of Appeals for the Fifth Circuit has resulted in a decision in direct and fundamental conflict with the decisions of the Georgia Court of Appeals.[9]

The seriousness of the conflict between the decision of the Court of Appeals for the Fifth Circuit and those

[9]If the Court of Appeals for the Fifth Circuit had followed *Mosaic Tile,* its decision would not now be in direct and irreconcilable conflict with the Georgia Court of Appeals' May 2, 1967, decision in *Nationwide Mutual Insurance Company v. Peek.*

of the state appellate courts is not mitigated by the fact that *Nationwide* and *Mosaic Tile* were decided by the Georgia Court of Appeals, an intermediate appellate court, rather than by the Georgia Supreme Court, for this Honorable Court has on many occasions held that where state supreme court precedents are lacking, Federal courts in diversity cases such as the one at bar are bound by the decisions of intermediate state appellate courts. *Stoner v. New York Life Ins. Co.*, 311 U.S. 464, 467 (1940); *Six Companies of California v. Joint Highway District No. 13*, 311 U.S. 180, 188 (1940); *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 236-37 (1940).

2.

The second reason why this Honorable Court should grant Continental's petition for a writ of certiorari is that the questions presented are of importance to the doctrine announced in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

In *Erie* this Court held that in "non-Federal question" cases the law to be applied by a Federal court is the law of the state. 204 U.S. 78.[10] Petitioner believes that the questions presented are of great importance to the *Erie* doctrine, for if the now-contrary Federal Court of Appeals decision is allowed to stand, the scope and meaning of the *Erie* doctrine will have been restricted

[10]The "Rules of Decision Act," 62 Stat. 944, 28 U.S.C. §1652, provides:

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

by the fortuitous circumstance that a state appellate court did not announce the applicable state law in a decision "on all fours" with the case at bar until shortly after a decision by a Federal court.

Petitioner recognizes that at some stage in the proceedings litigation must become final, and that, of necessity, the "finality rule" must circumscribe somewhat the *Erie* doctrine. Petitioner believes, however, that where, as here, the law of the state is announced by a state appellate court first in clearly applicable dictum and then, before the expiration of the time allowed for review of the contrary Federal court decision, in an "all fours" decision, to allow the contrary Federal court decision to stand would seriously thwart the policy of the *Erie* doctrine.

Petitioner further believes that settlement by this Court of the above-stated question is plainly in the public interest, for otherwise the right of Federal court litigants to have their disputes settled according to applicable state law may be impaired by fortuitous circumstances attending the timing of "four square" state court opinions.

3.

The third reason why this Honorable Court should grant this petition for a writ of certiorari is that, in light of the Georgia Court of Appeals' recent decision in *Nationwide Mutual Insurance Company v. Peek,* Appendix F, *infra,* p. 36a, the decision below concerning the applicability of the exclusion clause in the Continental-Dance policy is clearly erroneous. The error in the decision below has already been discussed.

CONCLUSION

Petitioner here seeks to have this Court itself review the decision of the court below. However, in the alternative, petitioner seeks to have this case remanded to the Court of Appeals for the Fifth Circuit for reconsideration in the light of the recent decision of the Georgia Court of Appeals in *Nationwide Mutual Insurance Company v. Peek,* Appendix F, *infra,* p. 36a. In support of this alternative request for relief, petitioner shows to the Court:

(1) Because the *Nationwide* decision was not decided until sixty days after the Fifth Circuit's denial of rehearing, under circumstances where counsel was doubtful whether an extraordinary petition for further rehearing could be processed while maintaining at the same time the right to petition this Court for a writ of certiorari, and because the *Nationwide* decision has not yet been reported, the Court of Appeals for the Fifth Circuit has not had an opportunity to consider the effect of that decision upon the case *sub judice;* and

(2) This Court on past occasions has considered it appropriate to remand cases to Circuit courts for reconsideration in light of an "intervening" decision by a state appellate court. See *Nolan v. Transocean Airlines,* 365 U.S. 293, 295-96 (1961); *Conner v. Simler,* 367 U.S. 486 (1961); and Bickel, *The Supreme Court, 1960 Term,* 75 Harv. L. Rev. 40, 90-99 (1961).

For the foregoing reasons, Petitioner respectfully requests that its petition for a writ of certiorari be granted, and that this Honorable Court review the judgment of

the court below, or, in the alternative, that in the exercise of its supervisory powers over the lower Federal courts this Honorable Court remand this case to the court below for reconsideration in light of the recent decision by the Georgia Court of Appeals in *Nationwide Mutual Insurance Company v. Peek, supra.*

Respectfully submitted,

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May 31, 1967

CERTIFICATE OF SERVICE

I, Charles A. Moye, Jr., one of the attorneys for Continental Casualty Company, Petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 31st day of May, 1967, I served copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit upon the respondents, by depositing in a United States mailbox copies of same, with first class postage prepaid, correctly addressed to the following, as required by Supreme Court Rule 33:

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May 31, 1967

APPENDIX A

Opinion of the Court of Appeals Filed December 1, 1966

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 22879

FLOAT-AWAY DOOR COMPANY and NATIONAL SURETY COMPANY,

Appellants,

versus

CONTINENTAL CASUALTY COMPANY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

(December 1, 1966.)

Before RIVES, BELL and THORNBERRY, Circuit Judges.

RIVES, Circuit Judge: This appeal is from the denial of appellants' and the grant of appellee's motion for summary judgment in a declaratory judgment action

concerning the coverage of two liability insurance policies.[1] The material facts may be summarized as follows:

Dance had contracted with Float-Away to transport a shipment of doors from Float-Away's plant in Atlanta, Georgia, to Universal Manufacturing Company (Universal) in Ohio. Dance left one of its trailers at Float-Away's plant where it was loaded by Float-Away, picked up by Dance and inspected and sealed at Dance's Atlanta terminal, and transported to Cincinnati, Ohio. In Cincinnati, Dance turned the trailer over to another carrier which transported it to the premises of Universal in Camden, Ohio. There, in the course of the unloading operation, Barrett, an employee of Universal, was injured when some of the doors fell from the trailer. Barrett filed suit against Float-Away and Dance, alleging that both parties had been negligent in the loading and inspection of the trailer. Float-Away and Dance then called upon Continental to defend them in that suit, claiming that both were covered under Continental's policy. Continental acknowledged that its policy covered Dance, but refused to defend Float-Away, denying that Float-Away was an additional insured within contemplation of the omnibus clause in Continental's policy. Thereupon, Float-Away and National Surety filed this suit for a declaratory judgment that Barrett's claim

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[1]One, an automobile liability policy issued by appellee, Continental Casualty Company (Continental) to Dance Freight Lines (Dance), a common carrier; and, two, a comprehensive liability policy (both general and automobile liability) issued by appellant, National Surety Corporation (National Surety) to the co-appellant, Float-Away Door Company (Float-Away).

against Float-Away came within the coverage of Continental's policy. Both parties moved for summary judgment. The district court sustained Continental's motion for summary judgment, ruling that Float-Away was not an additional insured under the policy which Continental had issued to Dance. Several months later, Barrett's personal injury action went to trial with Float-Away being defended by National Surety and Dance being defended by Continental. After a full day's trial the action was compromised on the basis of a consent judgment for $175,000.00. Continental has paid into court $87,500.00 on behalf of Dance. This appeal involves only the remaining $87,500.00 which National Surety claims that it does not owe on behalf of Float-Away.

Three principal questions are presented:

I. Is Float-Away an additional insured within the meaning of the omnibus clause in the policy that Continental issued to Dance?

II. If Float-Away is an additional insured under Dance's policy, do the employee-workmen's compensation exclusions in that policy exclude coverage?

III. If Float-Away is covered by Dance's policy, is that coverage primary when considered in conjunction with Float-Away's policy with National Surety?

Preliminarily we discuss briefly the choice of law problem with regard to the interpretation of the insur-

ance policy. The conflict of laws rules to be applied by the federal district court in a diversity case must conform to those prevailing in the courts of the state in which it sits. *Klaxon Co. v. Stentor Co.*, 1941, 313 U.S. 487, 496; *Van Dusen v. Barrack*, 1964, 376 U.S. 612, 628. Georgia appears to adopt the law of the place of making with respect to matters of contract interpretation, but views the place of making as where the contract is *delivered*, not where it is executed. *Pink v. AAA Highway Express, Inc.*, Ga. 1941, 13 S.E.2d 337, 344, *aff'd*, 1941, 314 U.S. 201; see also, *The Scotland*, 1881, 105 U.S. 24, 29; 16 Am.Jur.2d, Conflict of Laws §11. It is unclear from the record and the briefs, however, where Continental's policy was delivered. The policy was apparently executed in Illinois, and Dance's principal place of business is in Kentucky. So far as appears, however, neither the law of Illinois nor Kentucky is dispositive of the issues presented here. There is no applicable foreign statute in either State, and the applicable case law is not shown to differ materially in the two States. This Court recently described the Georgia conflict of laws rule as follows:

> "Where there is no applicable foreign statute, the Georgia courts then go through a two-step process. First, in the absence of pleading and proof of 'foreign law,' the Georgia courts presume that 'the common law' is in effect in the foreign state. Second, in determining what this 'presumed' common law is, the Georgia courts rather than looking to the foreign case law, look to 'the common law' as illumined by Georgia decisions."

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Budget Rent-A-Car Corporation of America v. Fein, 5 Cir. 1965, 342 F.2d 509, 513.[2]

Thus we find that little or no practical help toward the solution of the questions presented is afforded by the choice of law to be applied in the interpretation of the insurance policy, other than to be remitted to a consideration of the common law.

Preliminarily also, we consider the applicability of the familiar general rule that an insurance policy is to be construed liberally in favor of the insured. The rationale of that rule has been variously stated. See 29 Am.Jur., Insurance §259, pp. 643, 644; 44 C.J.S., Insurance §297, pp. 1174, 1175; 13 Appleman, Insurance Law & Practice §7482, p. 202. Georgia has adopted this principle where the terms of the policy are not clear and unambiguous.[3]

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[2]Baker v Metallizing Co. of America, Ga.App. 1961, 118 S.E.2d 843; Gorman v. Griffin, Ga.App. 1944, 28 S.E.2d 897; Minter v. Kent, Ga.App. 1940, 8 S.E.2d 109; Aetna Life Ins. Co. v. Evans, Ga.App. 1937, 192 S.E. 483; Thomas v. Shepherd, Ga.App. 1931, 156 S.E. 724; Reliance Realty Co. v. Mitchell, Ga.App. 1930, 152 S.E. 295; Swing v. Farrar, 124 Ga. 951, 53 S.E. 269; Wells v. Gress, 118 Ga. 566, 45 S.E. 418.

[3]Dorsey v. State Mutual Life Assur. Co. of Worcester, N.D. Ga. 1964, 238 F.Supp. 391; American Family Life Ins. Co. v. Glenn, 109 Ga.App. 122, 135 S.E.2d 442; Burke v. Life Insurance Co. of Georgia, 104 Ga.App. 865, 123 S.E.2d 426; United Benefit Life Ins. Co. of Omaha v. Glisson, 105 Ga.App. 122, 123 S.E.2d 350; Dunn v. Travelers Indemnity Co., 217 Ga. 426, 122 S.E.2d 518; Macon Auto Auction v. Georgia Casualty & Surety Co., 104 Ga.App. 245, 121 S.E.2d 400; Davis v. United American Life Ins. Co., 215 Ga. 521; 111 S.E.2d 488; John Hancock Mut. Life Ins.

If National Surety were not in this suit, certainly the above-discussed rule would apply. We are called upon to construe an insurance policy and, in so doing, we do not feel compelled to observe the coverage extended Float-Away by other insurers.[4]

Though neither party has cited authority to support its particular position as to the effect of National Surety being a movant in this case, we have noted several cases where courts have not abandoned the liberal construction rule even though an insurance company was the party seeking relief against another insurance company.[5]

Co. v. Frazer, 194 Ga. 201, 20 S.E.2d 915; Massachusetts Benefit Life Ass'n v. Robinson, 104 Ga. 256, 30 S.E. 918.

Ga. Code Ann. §20-704 (5) provides: "If the construction is doubtful, that which goes most strongly against the party executing the instrument, or undertaking the obligation, is generally to be preferred." See Boston Insurance Co. v. Gable, 5 Cir. 1965, 352 F.2d 368.

Ga. Code Ann. §56-2419 provides: "Every insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy and as amplified, extended, or modified by any rider, endorsement, or application made a part of the policy."

[4]If we were to be persuaded by Float-Away's policy with other insurers, we would also have to consider any cancellations or refusals to accept liability by such insurers. The relation between Float-Away and third-party insurance companies should not be catalyst for our decision.

[5]Iowa National Mut. Ins. Co. v. Fidelity & Cas. Co. of New York, 62 Ill.App.2d 297, 210 N.E.2d 622; Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co., 266 N.C. 430, 146 S.E.2d 410; Indem-

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We are also mindful of the desirability, as a matter of public policy, to protect the injured party and to construe the policy in such a manner so that those who are injured are not abandoned without compensation.[6] In construing an omnibus clause, the New Jersey Supreme Court stated, correctly we think, that "it is settled doctrine that an insurance contract is to be liberally construed for the protection, not only of the named insured and those within its omnibus clause, but also the innocent plaintiff who was injured by the negligent operation of the insured automobile." *Eggerding v. Bichnell,* 118 A.2d 820.

There are cases which point to a more constrained interpretation of the insurance policy where the party seeking relief against the insurer is not an insured. *Cook v. Kozell,* 176 Ohio St. 332, 199 N.E.2d 566, involved a suit by an insured party and its insurance company against the insurance company of an automobile dealer, whose customer, while driving a recently delivered car, hit the injured party. The plaintiffs sought a recovery on the grounds that the policy of the automobile dealer covered the negligent driver. The plaintiffs asked for a liberal construction against the insurer but the Ohio court refused, noting:

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nity Insurance Co. of North America v. Metropolitan Cas. Ins. Co. of New York, 166 A.2d 355.

[6]A liberal construction of the omnibus clause may be indicated by the public policy evidenced by statutory requirements. See 7 Appleman, Insurance Law & Practice §4353, and compare 49 U.S.C.A. §315.

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"First, the plaintiff was not a party to the contract of insurance and, therefore, was not in a position to urge, as one of the parties, that the contract be construed strictly against the other party. Second, the construction urged by the plaintiff would have been a disadvantage to both parties to the contract. It would have made Continental [the insurer] liable for damages for which its named insured was not liable and for a hazard not covered by the policy and the Euclid Lord Company [the automobile dealer] has no interest in covering the purchaser of an automobile for liability for damage which such purchaser causes through his negligent operation of the automobile after the company has delivered it to him. This could only result in higher insurance premiums for the Euclid Lord Company. An insured gets the coverage he pays for, and if the coverage is to be increased beyond that which he needs or for which the policy provides, the premiums will necessarily be increased. Therefore, the plaintiff who is not a party to the contract is not in a position to urge a construction of the contract which would be detrimental to both parties to the contract."

Though not bound by the Ohio court's reasoning, we do distinguish the *Cook* decision from the case now before us. Float-Away was an insured at least during the time it used Dance's trailer. It is not a stranger to the policy, but a possible third-party beneficiary within the meaning of the omnibus clause. *American Fidelity &*

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Casualty Co. v. St. Paul-Mercury Indemnity Co., 5 Cir. 1957, 248 F.2d 509; 13 Appleman, Insurance Law & Practice §4354, pp. 243, 244. Second, the Ohio court first concluded that the driver of the automobile was not an insured and that the hazard was not covered by the policy; and, then, determined therefore that the injured party had no standing to seek a liberal construction. We are not confronted with an obvious case involving uninsurability as was the Ohio court.

Our attention is called to another case, *Esfeld Trucking, Inc. v. Metropolitan Insurance Co.*, 193 Kan. 7, 392 P.2d 107, a subrogation action between two insurance companies to determine the coverage of the company which issued a policy to a truck owner. The Kansas court held at p. 110:

> "We believe the policy is clear and unambiguous and there is no need for judicial interpretation or the application of rules of liberal construction [citing cases] particularly since this is an action between two insurance companies who draw their own policies and should know the meaning of the words used in those policies as they are understood in the general field of insurance."

Assuming that the language was clear and unambiguous, there was no need for a liberal or narrow construction for, if the plain meaning of the words portray but one construction, the court must adopt that construction. If there is ambiguity, we do not agree that the presence of an insurance company as a subrogee should prohibit

a liberal construction in favor of the insured. Not only does the subrogee stand in the shoes of his principal, but also there is no validity to the argument that, because the subrogee happens to be an insurance company, it would necessarily know the meaning of the language in a policy of another insurance company. Furthermore, under Georgia law we are bound to construe an ambiguous contract against the one who made it. Ga. Code Ann §20-704 (5).[7]

We conclude, therefore, that appearance of National Surety as a co-plaintiff does not in this case distract from our construing Dance's policy most favorably for Float-Away, if Float-Away is, in fact, an insured.

I.

The critical clauses in the policy issued to Dance by Continental provide in pertinent part as follows:

"INSURING AGREEMENTS

"I Coverage A — Bodily Injury Liability

"To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages * * * sustained by any person, caused

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[7]In Prickett v. Hawkeye-Security Insurance Co., 10 Cir. 1960, 282 F.2d 294, 298, the court distinguished between the interpretation to be made when the rights of the public are involved, and the interpretation to be made when fixing rights between parties other than insured members of the public.

by accident and arising out of the ownership, maintenance or use of any automobile.

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"III Definition of Insured

"The unqualified word 'insured' includes the named insured and also includes any person while using an owned automobile or a hired automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission * * *.

* * * * *

"CONDITIONS

* * * * *

"4. Purposes of Use Defined * * * (c) Use of automobile includes the loading and unloading thereof."

Continental virtually admits, as it must, that Float-Away was an additional insured within contemplation of the omnibus clause of Dance's policy *at the time* Float-Away was loading the doors on Dance's trailer, i.e., *at the time* the alleged negligence occurred. Continental urges, however, that the phrase "while using" in the clause defining "insured" limits Float-Away's status as an insured to the period while Float-Away was using (loading) Dance's trailer, and since no accident or injury occurred during that period there is no liability. Thus, Continental's theory is that once the loading operation was completed, Float-Away ceased to be an

additional insured under Dance's policy, and, since the accident did not occur until after the negligent loading was completed, Float-Away was not entitled to protection under the policy. Float-Away, on the other hand, stresses the language of the coverage clause and argues that the accident "arose out of" the use (loading) of the trailer by Float-Away.[8]

Continental relies on cases which hold that an accident which, as to its nature, represents a risk covered by a policy of liability insurance is not covered if it occurs after the period of coverage under the policy, citing the cases collected in an annotation found in 57 ALR 2d 1385-1394. However, as pointed out in 7 Appleman, Insurance Law & Practice §4268, the commencement and duration of the risk and the expiration of policy protection are governed by the particular provisions of the policy contract. Compare *Provident Life & Accident Ins. Co. v. Nitsch,* 5 Cir. 1941, 123 F.2d 600, 603. Such terms are nearly always very definite. For example, in this case Continental's original policy provided: "Item 2. Policy Period: From June 1, 1958 to June 1, 1961. * * * This policy applies only to accidents which occur during the policy period * * * ." Endorsement No. 4, effective 6/1/61, provided in part: "It is

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[8]Our decision must further be guided by the proposition that an "automobile policy is to be construed as a whole rather than considering only certain clauses or fragmentary parts, and effect should be given, if possible, to all provisions thereof." 13 Appleman, Insurance Law & Practice §7482, at p. 203. See also 7 Appleman §4354.

hereby agreed that Item 2 of the Declarations is amended to read as follows: Policy Period: From June 1, 1961 to Until Cancelled."

To re-state Continental's contention, we quote from its brief:

> "It is beyond dispute that Mr. Barrett's injuries did not occur 'at the same time' or 'at or during which time' Float-Away was loading the Dance trailer — that is to say the injury did *not* occur (in the language of Continental's policy) 'while [Float-Away was] using' the trailer. Float-Away was an insured of Continental, if at all, only 'while' loading the trailer. The accident did not occur 'during the time that,' 'at the same time' or 'at or during which time' Float-Away was an insured of Continental."

The "accident" and Barrett's injuries occurred during the "Policy Period" defined in the contract. The words "while using" as employed in the omnibus clause are not sufficiently definite to provide a different "Policy Period" for the additional insured. The case involving a fact situation most closely akin to that in the instant case is *Gulf Insurance Co. v. Mack Warehouse Corp.*, E.D. Pa. 1962, 212 F.Supp. 39.[9] The pertinent clauses

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[9]See also, Federal Insurance Co. v. Michigan Mutual Liability Co., E.D. Pa. 1959, 172 F.Supp. 858, *aff'd*, 3 Cir. 1960, 277 F.2d 442; United States Fidelity & Guaranty Co. v. Church, N.D. Calif. 1952, 107 F.Supp. 683, 687; Panhandle Gravel Co. v. Wilson, Tex.Civ.App. 1952, 248 S.W.2d 779; Muller v. Sun Indem-

in the policy in issue in that case contained language almost identical to that contained in Continental's policy. There the district court ruled that the language was broad enough to cover a party who negligently loaded a truck even though the accident giving rise to the injury did not occur until the truck was being unloaded by another party. The court reasoned that:

> "The policy does not restrict coverage to accidents occurring while the loading operation is being conducted. On the contrary, it expressly covers claims for damages 'Arising out of the * * * use [including loading] of the automobile.' "

212 F.Supp. at 41. The significant distinguishing factor in that case was that the party seeking coverage was a *named* insured rather than an additional insured. Nevertheless, the court's language appears broad enough to include a similar claim by an additional insured:

> "To hold otherwise would be to make the 'loading and unloading' clause almost indistinguishable from the 'ownership, maintenance or use' clause, for it would require that the loading or unloading clause should not be effective except where the automobile is actually in use for the purpose. Such a result would run contrary to the purpose of the loading and unloading clause, which is an extension of the

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nity Co. of New York, 96 N.Y.S.2d 140, 276 App.Div. 1028, *aff'd*, 302 N.Y. 634, 97 N.E.2d 760; Bobier v. National Casualty Co., 143 Ohio St. 215, 54 N.E.2d 798; 7 Appleman, Insurance Law & Practice (1962) §4322.

ownership, maintenance and use clause, and not a limitation upon it." 212 F.Supp. at 41.

Float-Away was covered as an additional insured under Dance's policy "while using" (loading) the trailer. That being true, it follows that the extent of that coverage should be measured by the clause obligating Continental to pay damages "sustained by any person, caused by accident and *arising out of* the ownership, maintenance or use of any automobile." (Emphasis added.) Clearly, the accident "arose out of" the negligent loading of the trailer by Float-Away, at which time it *was* an additional insured under the policy.

II.

Continental further urges that, even if Float-Away is an additional insured under Dance's policy, the following clauses exclude coverage:

"This policy does not apply:

* * * * *

"(b) * * * to bodily injury to or sickness, disease or death of any employee of the insured arising out of and in the course of (1) domestic employment by the insured, if benefits therefor are in whole or in part either payable or required to be provided under any workmen's compensation law * * *;

"(c) * * * to any obligation for which the insured or any carrier as his insurer may be held liable under any workmen's compensation, unem-

ployment compensation or disability benefits law, or under any similar law * * * ."

It is undisputed that Barrett applied for and received workmen's compensation benefits from the State of Ohio by virtue of his employment with Universal. Continental argues that the term "the insured" as used in the above two clauses should be interpreted as referring to *any* insured under the policy, thus excluding coverage with regard to all insureds under the policy when the injured person is an employee of *any* insured. National Surety and Float-Away, on the other hand, contend that "the insured" refers only to the party seeking coverage under the policy, thus excluding coverage only when the injured claimant is the employee of the party seeking coverage, or when the party seeking coverage has workmen's compensation liability to the injured employee. There exists a pronounced conflict concerning the interpretation of such clauses.[10]

The better reasoned cases adopt a restrictive interpretation of "the insured" as referring only to the party seeking coverage under the policy. See discussion in *Maryland Casualty Co. v. American Fidelity & Cas. Co.*, E.D. Tenn. 1963, 217 F.Supp. 688.[11] The primary ob-

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[10]See cases cited in Kelly v. State Auto. Ins. Ass'n, 6 Cir. 1961, 288 F.2d 734, 735, n. 1, 736, n. 2, and in Maryland Casualty Co. v. American Fidelity & Cas. Co., E.D. Tenn. 1963, 217 F.Supp. 688, 690, n. 1.

[11]Continental cites cases involving the issue whether coverage should be afforded to a party claiming to be an additional insured as to a claim by an employee of the *named* insured.

jective of such exclusionary clauses is to avoid duplication of coverage with respect to compensation insurance. With that purpose in mind, there seems to be no reason why an insured should not be indemnified against the claim of an employee outside of that insured's employment.

If the reasoning of Continental would prevail, thereby excluding coverage to one insured as to a claim by an employee of another insured, then Dance, the named insured, as well as Float-Away, would be excluded from coverage in the instant case, although the injured claimant is an employee of neither Dance nor Float-Away, and neither is liable under any compensation law.[12]

III.

The policy issued by Continental to Dance and the one issued by National Surety to Float-Away each contain the same provisions with regard to additional insurance:

> "If the insured has other insurance against a loss covered by this policy the company shall not be

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Michigan Mutual Liability Co. v. Continental Casualty Co., 7 Cir. 1961, 297 F.2d 208; Kelly v. State Automobile Ins. Ass'n, 6 Cir. 1961, 288 F.2d 734. In this case, the injured party was an employee of Universal and not the named insured, Dance. Compare Michigan Mutual Liability Co. v. Continental Casualty Co., *supra*, at p. 210. See also, Fireman's Fund Indemnity Co. v. Mosaic Tile Co., 101 Ga.App. 701, 115 S.E.2d 263.

[12]See American Fidelity & Casualty Co. v. St. Paul-Mercury Indemnity Co., 5 Cir. 1957, 248 F.2d 509, 517.

liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance under this policy with respect to loss arising out of the maintenance or use of any hired automobile insured on a cost of hire basis or the use of any non-owned automobile shall be excess insurance over any other valid and collectible insurance."

Float-Away and National Surety contend that since the trailer was not owned by Float-Away, but rather by Dance, National Surety is liable only for any excess over Continental's coverage. Continental does not refute this position. We agree with National Surety that the non-ownership clause, with its excess coverage provision in Float-Away's policy, does not constitute other "valid and collectible insurance" within the meaning of Dance's policy. The liability of National Surety, as an excess insurer, arises after the coverage of Dance's policy has been exceeded.[13] Applying this reasoning, Continental as insurer of Dance, the owner of the involved trailer, is primarily liable to the extent of its policy limits.

Based upon the terms of Dance's policy, Continental is liable for Barrett's judgment against Float-Away.

REVERSED AND REMANDED.

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[13]See Citizens Mutual Automobile Insurance Co. v. Liberty Mutual Ins. Co., 8 Cir. 1959, 273 F.2d 189; 8 Appleman, Insurance Law & Practice §4914, n. 43.

APPENDIX B

Opinion of the Court of Appeals Denying Petition for Rehearing Filed March 3, 1967

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 22879

FLOAT-AWAY DOOR COMPANY and NATIONAL SURETY COMPANY,

Appellants,

versus

CONTINENTAL CASUALTY COMPANY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

(March 3, 1967.)

ON PETITION FOR REHEARING

Before RIVES, BELL and THORNBERRY, Circuit Judges.

PER CURIAM: After consideration, appellee's petition for rehearing is denied. However, several points urged in the petition merit comment.

Float-Away is a plaintiff in this suit and is, therefore,

entitled to the liberal construction doctrine. *American Fidelity & Casualty Co. v. St. Paul-Mercury Indemnity Co.*, 5 Cir. 1957, 248 F.2d 509, is clearly distinguishable, for in that case St. Paul sued not only another insurance company but also Larsen, its own insured. We need not consider inappropriate alignment of parties or obviously noninterested parties. Neither situation confronts us in this case.

The appellee erroneously assumes that Float-Away is not a real party in interest. See Rule 17a, Fed.R.Civ.P. The judgment in favor of Barrett was against Float-Away, not National Surety. Float-Away, as an omnibus insured, is an interested party to this action seeking to enforce the policy coverage of judgment debts incurred by insureds.

To re-emphasize, the mere fortuitous existence of National Surety as Float-Away's comprehensive liability insurer should not distort a proper construing of Dance's policy as applied to Float-Away. Though the list of intramural insurance Donnybrooks is constantly growing,[1]

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[1]Hamilton v. Maryland Casualty Co., 5 Cir. 1966, 368 F.2d 768. The appearance of insurance companies on both sides of the case is no longer a unique or unusual phenomenon. Facing this reality and being well aware of the ultimate beneficiaries of our decision, we are constrained, however, to construe these contractual agreements without unnecessary diversions and conjectures concerning tactics of parties and the motivating factors, initiating the law suit. If we were to do otherwise, an insurance company would be handicapped in pressing or supporting its

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we cannot shrink from our duty to construe the particular policy confronting us. National Surety is a party to this suit, but this alone should not detract from Float-Away's claim.

As to *Fireman's Fund Indemnity Co. v. Mosaic Tile Co.*, 101 Ga.App. 701, 115 S.E.2d 263, the Georgia Court of Appeals was confronted with a case that involved an injured employee of the named insured. The opinion does not indicate that if the injured employee was employed by a third party, who is an omnibus insured different from the one involved in the action before the court, that a similar holding would result. While Georgia did not restrict the definition of "insured" to the party seeking coverage, it also did not adopt the all-inclusive approach suggested by the appellee. A definition unambiguous in the light of some circumstances, may become hazy and unclear when additional factors cast their shadows.[2] We are not convinced that the definition which would apparently exclude coverage when the employee of a named insured is injured also denies coverage to an employee of Universal, a different omnibus insured.

Finally in noting the rationale of *Gulf Insurance Co. v. Mack Warehouse Corp.*, E.D. Pa. 1962, 212 F.Supp.

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named insured's claim that he is an omnibus insured under another insurer's policy.

[2]The existence of the employee exclusion clause does not alter our decision that *Mosaic Tile Company* is not controlling. The same definition of "insured" is involved.

Appendix B — Opinion of the Court of Appeals, Denying Petition for Rehearing Filed March 3, 1967

39, we were not adopting its holding for, as we pointed out, the case can be distinguished. The discussion concerning the exclusionary clause is cited, however, with approval.

The petition for rehearing is DENIED.

APPENDIX C

Opinion of the District Court
Filed May 11, 1965

IN THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION.

FLOAT-AWAY DOOR COMPANY and
NATIONAL SURETY CORPORATION,

Plaintiffs,

vs.

CONTINENTAL CASUALTY COMPANY,

Defendant.

CIVIL ACTION NO. 9147.

ORDER ON MOTIONS FOR SUMMARY JUDGMENT.

In this case motion for summary judgment has been filed by both the plaintiffs and the defendant.

Briefly stated, the following facts do not seem to be in dispute:

This action for declaratory judgment seeks to determine the relative liabilities of National Surety Corporation, a plaintiff, and Continental Casualty Company, the defendant in the instant case, and growing out of another action in this court, Civil Action No. 8562, en-

titled "Lawrence E. Barrett vs. Float-Away Door Company and Dance Freight Lines," referred to herein as the primary suit. In that action Barrett sues for personal injuries and names as one defendant, Float-Away Door Company, which held an automobile liability policy from National Surety Corporation. He also sued Dance Freight Lines, Inc., holding a similar policy from Continental Casualty Company. In that action plaintiff contends that Float-Away Door Company negligently loaded a trailer belonging to Dance Freight Lines, that the latter was negligent in not inspecting the same and discovering the same, but it appears that Barrett, an employee of Universal Manufacturing Company ("Versco"), in Ohio, received his injuries while the trailer was being moved by the latter on its own premises.

National Surety Corporation herein contends that Continental's policy to Dance provides coverage to Float-Away because it names as additional insured, any person "while using" Dance's trailer, and because the policy further defines "use" as "loading and unloading". The policy issued by Continental to Dance contained the following language:

> "With respect to the injuries for bodily injury liability the unqualified word 'insured' includes the named assured and also includes any person *while using* an owned automobile or a hired automobile, and any person or organization *legally responsible for the use thereof,* provided the *actual use* of the automobile is by the named insured or with his permission" (italics supplied).

Appendix C — Opinion of the District Court Filed May 11, 1965

This Court rules that the language "while using" refers to the actual use of the trailer in question and does not apply in the instant case, because at the time of Barrett's injuries the trailer was being actually used by his own employer on the latter's premises.

This Court also rules that the language of the policy to the effect that the word "insured" includes any person who is not only using the automobile, but a person "legally responsible for the use thereof," (though having permission by the named insured to use the same) does not cover Float-Away Door Company, and does not relieve the latter's insuror (National Surety Corporation) for the reason that Float-Away, at the time of Barrett's injuries, was not "legally responsible for the use thereof" within the meaning of the policy. This Court is of the opinion that the following cases cited by counsel for Continental Casualty Company demand the above ruling:

Buckeye Union Casualty Company v. Illinois National Insurance Company, 2 O.S. (2d) 59, 31 O.O. (2d) 49 (April 17, 1965); *Travelers Insurance Company v. Safeguard Insurance Company*, 195 N.E. 2d 86 (Mass., 1964); *Raube v. Christenson*, 270 Wis. 297, 70 N.W. 2d 639 (Wisc. 1955); *Provident Life & Accident Insurance Company v. Nitsch*, 123 F.2d 600 (C.A.5, 1941); *Burke v. Life Insurance Company of Georgia*, 104 Ga. App. 865, 869, 123 S.E. 2d 426 (1961); *Yandle v. Hardware Mutual Insurance Company*, 314 F.2d 435 (C.A. 9, 1963); *Liberty Mutual Insurance Company v. Hartford*

Appendix C — Opinion of the District Court Filed May 11, 1965

Accident & Indemnity Company, 251 F.2d 761 (C.A. 7, 1958).

As opposed to the above plaintiffs' counsel cites, as the only cases plaintiffs' counsel have been able to discover, the cases of *Gulf Insurance Company v. Mack Warehouse Corporation,* 212 Fed. Supp. 39 (E.D. Penn. 1962) and *Panhandle Gravel Co. v. Mack Warehouse Corporation* (Texas), 248 S.W.2d 779.

Counsel for the defendant herein shall submit to this Court a Judgment in accordance herewith.

This the 11th day of May, 1965.

/s/ FRANK A. HOOPER
FRANK A. HOOPER
United States District Judge

APPENDIX D

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1966

No. 22879

D. C. Docket No. Civil Action 9147

FLOAT-AWAY DOOR COMPANY and NATIONAL SURETY COMPANY,

Appellants,

versus

CONTINENTAL CASUALTY COMPANY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

Before RIVES, BELL and THORNBERRY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the

Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be and it is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellee, Continental Casualty Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

Issued as Mandate: Mar. 15, 1967

December 1, 1966

Court Costs:

Docketing Cause, etc.	$ 25.00
Cost of Printing Record	660.00
Total	$685.00

APPENDIX E

Fireman's Fund Indemnity Company *v.* Mosaic Tile Company *et al.*

101 Ga. App. 701, 115 S.E. (2d) 263 (1960)

A contract of insurance clearly defining the meaning of "insured" leaving no ambiguity or deceptive verbiage, is not open to construction, and the literal meaning must be attributed to it.

DECIDED MAY 9, 1960—REHEARING DENIED MAY 23, 1960.

Declaratory judgment. Fulton Superior Court. Before Judge Pharr. November 24, 1959.

On November 29, 1955, Aaron Martin sustained injuries as a result of an accident which arose out of and in the course of his employment by the Gate City Tile Company. At the time of his injuries, the employees of the plaintiff in this action for a declaratory judgment, the Mosaic Tile Company, were loading tile on the truck of Gate City Tile Company, and this truck was insured by Fireman's Fund Indemnity Company under Policy No. SF 4213220 issued to Gate City Tile Company. This policy was in full force and effect at the time of the injury.

The injured Aaron Martin subsequently was paid workmen's compensation in the amount of $3,352.50 in addition to certain legal expenses pursuant to the workmen's compensation laws of the State of Georgia. He also filed his action for damages based on these injuries against the Mosaic Tile Company in the Superior Court of Fulton County, and the Mosaic Tile Company, as an additional insured, called upon the Fireman's Fund In-

demnity Company to take over the defense of the action and to assume responsibility for handling the case within the terms and conditions of the policy of insurance which it issued to Gate City Tile Company. The insurance company declined and refused to take over the defense of the action. The Mosaic Tile Company thereupon brought this its action for a declaratory judgment naming as defendants the Fireman's Fund Indemnity Company and the injured employee of Gate City Tile Company, Aaron Martin.

It was stipulated and agreed between the parties that the truck was being used by the Mosaic Tile Company with the permission of the Gate City Tile Company at the time of the injury, and that Mosaic was therefore an additional insured under the policy and within its bodily injury liability coverage unless negatived by the terms of the exclusionary provisions of the insurance contract. The only question for decision, then, is whether the Mosaic Tile Company is entitled to the benefit of the policy in view of certain exclusionary clauses in the policy. All questions of law and fact were submitted to the judge, and a jury trial was expressly waived. The trial court adjudged that the Mosaic Tile Company was entitled to the protection of the policy, and thereafter the Fireman's Fund Indemnity Company filed its motion to vacate and set aside the judgment. The court refused and declined to do so. The Fireman's Fund Indemnity Company excepted, and the propriety of the judgment is presented to this court.

T. J. Long, Ben Weinberg, Jr., for plaintiff in error.

Appendix E — Fireman's Fund Indemnity Company v. Mosaic Tile Company

Greene, Neely, Buckley & DeRieux, Ferrin Y. Mathews, contra.

BELL, Judge. This is an action for a declaratory judgment to determine the question as to whether an insurance company (Fireman's Fund Indemnity Company) is bound to defend a suit seeking damages for personal injuries and pay any of the damages awarded therein where the carrier had issued an automobile bodily injury liability policy to a company (Gate City Tile Company) whose employee (Aaron Martin) was injured and received benefits under a workmen's compensation insurance policy, where the employee sued in tort another company (Mosaic Tile Company) which had become an additional insured under the terms of the insurance policy. Pursuant to the agreement and stipulation of the parties, the issues are narrowed to one point. The only matter for decision is the meaning of the word "insured," as contained in §§ (d) and (e) of the "exclusions" provisions of the policy issued by the Fireman's Fund Indemnity Company to the Gate City Tile Company. It is stipulated by the parties that the plaintiff in this declaratory judgment action, the Mosaic Tile Company, was an additional insured within the terms of the policy, but the contention is that the insurance was not extended to this particular injury because of the exclusionary sections.

The insurance contract in regard to matters here relevant seems clear and unambiguous so as to be clearly observable by the parties. Further, the insurance policy carefully defines its terms and contains the following:

Appendix E — Fireman's Fund Indemnity Company v. Mosaic Tile Company

"III. Definition of Insured: (a) With respect to the insurance for bodily injury liability and for property damage liability the unqualified word 'insured' includes the named insured and, if the named insured is an individual, his spouse if a resident of the same household, and also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or such spouse or with the permission of either." There is no dispute that the word "insured" as so defined does extend the initial coverage of the insurance to the plaintiff Mosaic Tile Company, but it is contended by Mosaic that the defined meaning of the word "insured" does not apply to it as to the exclusions in the policy. We cannot agree with this contention, for a contract of insurance clearly defining the meaning of the word "insured" which leaves no ambiguity or deceptive verbiage, is not open to construction, and the literal meaning must be attributed to it. If the exclusion applies to include also an additional insured, in this case the Mosaic Tile Company, then Mosaic in the final analysis has no coverage under this policy for the bodily injury.

To repeat, the policy defines the word "insured" as follows: ". . . With respect to the insurance for bodily injury liability . . . the unqualified word 'insured' includes the named insured and . . . also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named

insured or with the permission . . ." of the named insured. This definition is broad enough to include, and clearly does include, both the named insured and all additional insured. Let us look, then, at the exclusionary sections of the policy itself which remove from the coverage of the relative part of the policy the following: "(d) under coverage A, to bodily injury to or sickness, disease or death of any employee of the insured, arising out of and in the course of (1) domestic employment by the insured, if benefits therefor are in whole or in part either payable or required to be provided under any workmen's compensation law, or (2) other employment by the insured; (e) under coverage A, to any obligation for which the insured or any carrier as his insurer may be held liable under any workmen's compensation, unemployment compensation or disability benefits law, or under any similar law; . . ." Since the definition of insured as set forth in the policy is clear, then the exclusion applies to the Mosaic Tile Company as an additional insured. Inasmuch as the stipulation of facts entered into by the parties states: "It is agreed that on November 29, 1955, Aaron Martin sustained injuries as the result of an accident which arose out of and in the course of his employment by the Gate City Tile Company and that Fireman's Fund Indemnity Company as the insurance carrier for Gate City Tile Company paid to Aaron Martin compensation for such injuries as provided for in the Georgia Workmen's Compensation Act and also paid certain medical expenses which were incurred in treating Martin for his injuries," it is held that the exclusionary § (e) operates to preclude the Mosaic

Tile Company from coverage under the Fireman's Fund Indemnity Company policy issued to the Gate City Tile Company in the bodily injury suit at hand. It follows that the Fireman's Fund Indemnity Company is not required to defend the suit or to pay any damages which might be awarded to the plaintiff.

With the clear definition of the meaning of the unqualified word "insured" set out, the policy contains many provisions wherein it extends to or excludes from coverage, different parties depending upon whether the party is the insured or the named insured. For example, § (g) of the exclusionary provisions refers to the named insured and in that section cites the named insured three times. In § 12 of the insurance policy duties are required of the named insured. Section 13 also deals with the named insured. But in each instance the words "named insured" are qualified and thence the term where used applies only to the named insured and not to all "insured" as defined in the policy.

It seems clear, then, by the terms of the policy itself that the word "insured" when unqualified had a definite scope and meaning and that the words "named insured" had a more restricted and narrow meaning. These two disparate meanings seem obvious in the contents of the policy. Therefore, there is no ambiguity in this insurance policy as to these matters, and so no construction is required or permissible. The language must be given its literal meaning and the words their plain and ordinary effect as defined in the policy. *Wolverine Ins. Co. v. Jack Jordan Inc.*, 213 Ga. 299 (99 S.E. 2d 95); *Golden*

v. National Life & Ins. Co., 189 Ga. 79 (5 S.E. 2d 198, 125 A. L. R. 838); *Robinson v. Washington Nat. Ins. Co.*, 72 Ga. App. 19 (32 S.E. 2d 855); *Daniel v. Jefferson Standard Life Ins. Co.*, 52 Ga. App. 620 (184 S.E. 366). See also Code § 56-815.

The trial court erred in adjudging that the plaintiff was entitled to the protection of the policy, and erred in refusing and declining to vacate and set aside its judgment.

Judgment reversed. Felton, C. J., and Nichols, J., concur.

APPENDIX F

Opinion of the Georgia Court of Appeals in Nationwide Mutual Insurance Company v. Peek *et al.*

Filed May 2, 1967

_____ Ga. App. _____, _____ S.E. 2d_____ (1967)

(Appeal No. 42700; not yet reported.)

42700. NATIONWIDE MUTUAL INSURANCE COMPANY v. PEEK *et al.* Q-29

Since under the exclusion clause of an automobile liability insurance policy no coverage was afforded for damage to the insured's vehicle, the trial judge erred in denying the insurer's prayers for declaratory judgment.

Nationwide Mutual Insurance Company filed an action for declaratory judgment against Don Peek and Alton Wilson in Polk Superior Court. The petition alleged in part that: each of the defendants owned a tractor-trailer truck which was "under lease to and in the service of Watkins Motor Lines, Inc."; the two vehicles were involved in a collision in which Peek's truck was damaged; Peek instituted suit against Wilson to recover for the damages to his truck. Both Wilson and Peek contended: that Wilson was insured under a liability policy issued by Nationwide to Watkins Motor Lines, Inc.; that the policy afforded coverage for the alleged occurrence; that Nationwide was obligated to assume the defense of Peek's suit against Wilson. Nationwide contended that it had no obligation to defend the suit because the indemnity against Wilson's liability

for the property damage to Peek's truck was excluded by a provision of the policy.

The petition prayed that the court declare the rights and liabilities of the parties and decree that the plaintiff had no obligation to the defendants by reason of the insurance policy issued to Watkins Motor Lines, Inc.

The only question of fact submitted to the jury was whether at the time of the collision the defendants were employees of Watkins Motor Lines, Inc. The question was answered in the negative.

Thereafter the trial court reviewed the provisions of the insurance policy and, entertaining the opinion that the exclusion provision was not effective, entered judgment denying the prayers for declaratory relief. Nationwide filed a notice of appeal and the case is here for review.

QUILLIAN, Judge. 1. Enumeration of error number two complains of the trial judge's ruling that the exclusion provision of the insurance policy was not effective and the denying of the prayers for declaratory relief.

The policy issued by Nationwide to Watkins Motor Lines, Inc., defines an "insured" as including "... the Named Insured and also includes any person while using an owned automobile or a hired automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the Named Insured or with his permission." Both Wilson and Peek were permissive users of vehicles hired

by Watkins Motor Lines, Inc., and insureds under the policy.

An exclusion provision in the policy issued to Watkins Motor Lines, Inc., provides: "This policy does not apply . . . (f) under Coverage E, to injury to or destruction of property owned or transported by the Insured, or property rented to or in charge of the Insured other than a residence or private garage injured or destroyed by a private passenger automobile covered by this policy."

Nationwide's contention is based on the definition of the word "insured" and the exclusion clause (f) quoted above. It takes the position that the vehicle damaged was property which was owned by and in the charge of Peek, an insured, and therefore no coverage was afforded to either Wilson or Peek.

The appellees argue that the "severability of interest" clause contained in the policy requires a finding that the exclusion clause does not apply. The severability provision reads: "The term 'the insured' is used severally and not collectively, but the inclusion herein of more than one Insured shall not operate to increase the limits of the Company's liability."

Appellees contend the severability clause means: 1) that there are several insureds who are insured separately, independently of every other insured, therefore the effect of the clause was to separate the "omnibus" insured and the named insured in ascertaining the coverage of each; 2) when the term "insured" is used in

exclusions, it is to be applied as meaning only the insured against whom the claim is made or the suit is brought; 3) that in this case "Wilson" (the person claiming coverage) should be substituted for the word "insured" wherever it appears in the exclusion clause. Following this theory the appellees take the position that exclusion "f" does not apply to Wilson because: 1) the property damaged did not belong to him; 2) nor was it transported by him; 3) nor was it rented to him; 4) nor was he in charge of it.

The question presented as to the effect of the exact provisions of the policy is one of first impression in this state. There is a split of authority in other jurisdictions, with able decisions supporting different views. See Ann., 50 ALR2d 78, 99. However, the weight of authority is that the intent of the parties was to exclude from coverage property owned by the named or additional insureds. The "severability of interest clause" does not modify the exclusion clause to mean only the person claiming coverage. Transport Ins. Co. v. Standard Oil Co. of Texas, 161 Tex. 93 (337 SW2d 284), and cases cited therein. The purpose of the liability policy issued by Nationwide to Watkins was to protect those operating the vehicles against claims from the public and not as against damages sustained among themselves.

In the Standard Oil Company of Texas case, 337 SW2d 284, 289, supra, when dealing with a "severability clause" identical to the one in this case, the court stated: "The 'severability of interests' clause contained in the two standardized policies presently involved was

added to all standardized policies in 1955. With the exception of the case of American Fidelity [248 F2d 509] ... and the Simpson case [Mo. App., 327 SW2d 519] ... the remaining cited cases ... were decided before the adding of the 'severability of interests' clause. However, the policies involved in these two cases did not contain a 'severability of interests' clause. The addition of the 'severability of interests' clause does not indicate that the drafters of the policy form, by the addition of such clause, intended that the word 'insured' means only the person claiming coverage. We cannot adopt Standard's theory that by severing the interests in the case at bar, Standard is an insured under the 'omnibus clause' contained in the policy; the basis for Standard's contention being that the 'severability of interests' clause warrants the addition after the word 'insured' the words 'the insured who is asking for a defense', or 'the insured against whom the claim is made.' "

In deciding the Standard Oil Company of Texas case the court quoted from Simpson v. American Automobile Ins. Co., 327 SW2d 519, 528, which reads: "Simpson becomes an additional insured solely by reason of the Insuring Agreement III defining who is included in the unqualified word 'insured.' He was not a named insured and it seems clear that he should have no more protection under the policy than the primary insureds. ... In order to adopt the contention of the appellants and the position taken in the authorities cited by appellants we would have to interpolate in the exclusion clause such words as 'against whom liability is sought

to be imposed,' or 'against whom an action is brought.' This we cannot do."

Applying the above stated principles, Peek was an insured under the provisions of the policy. The property which was damaged was owned by and in his charge at the time of the collision. Therefore, under the exclusion clause no coverage was afforded for the damage to his vehicle. The trial court erred in denying the prayers for declaratory judgment.

2. In view of the ruling made in division one of this opinion it is not necessary to pass upon the remaining enumerations of error.

Judgment reversed. Jordan, P. J., and Deen, J., concur.